STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO: PEN-15-389

STATE OF MAINE,
Appellee

v.

NICHOLAS SEXTON,
Appellant

ON APPEAL FROM THE PENOBSCOT COUNTY
UNIFIED CRIMINAL DOCKET
Docket No. PENCD-CR-2012-03777

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

I. The trial court did not abuse its discretion by denying Sexton's motion for relief from prejudicial joinder.

II. Sexton cannot appeal the lack of a jury instruction on the defense of duress with respect to the murder counts, when Sexton affirmatively waived the instruction.

III. The trial court did not abuse its discretion in permitting Katelyn Lugdon to testify about the guns that she observed in Sexton's hotel room.

IV. The trial court did not commit clear error or an abuse of discretion in denying Sexton's Motion to Suppress his cell phone site location information.

V. There was no misconduct in the State's questioning of witness Mark Rowe on redirect examination.

SUMMARY OF ARGUMENT

The court committed no error in denying the motion for relief from prejudicial joinder and conducting a single trial of Sexton and Daluz for murder and arson. This Court has held that a trial court's decision denying severance will be upheld "unless it is demonstrated that the decision is an improper exercise of its discretion and prejudice is shown." *State v. Lakin*, 2006 ME 64, ¶ 7, 899 A.2d 777. The court below permitted joinder only after the State made a commitment not to use Daluz's out-of-court statements, thus assuring there would be no *Bruton* problem. The trial court also followed this Court's guidance on minimizing any risks of a joint trial by instructing the jury that it must consider the evidence against each defendant separately. (*Id.* at ¶ 11; Trial Transcript ("T.T.") I at 18; T.T. XIV at 153-154.) Sexton's claim that the joint trial denied him the opportunity to put in double hearsay (a witness relating what another witness may have heard Daluz say outside of court) is baseless; the statements as proffered by him would not have been admissible whether the trial was joint or separate.

The court did not abuse its discretion in denying Sexton's motion to suppress the cell phone site location information from his MetroPCS phone, obtained under the emergency provision of federal law (18 U.S.C. § 2702 (c)(4)), while he was reportedly armed, dangerous and fleeing across state lines as the prime suspect in a triple homicide. *State v. Babb*, 2014 ME 129, ¶ 9, 104 A.3d 878

(standard of review of suppression court findings). Sexton's motion sought to suppress the information to the extent that it located him at a hotel in Danvers, Massachusetts, when in fact it was his female companion's cell phone site location information that led investigators to him. Sexton had no standing to challenge the use of information from his companion's cell phone.

Moreover, even if the officers had used Sexton's cell phone site location information to locate him in Danvers, such use would not amount to a search under the Fourth Amendment that was subject to suppression. *See, e.g. In the Matter of the Application of the United States of America for an Order Pursuant to 18 U.S.C. §§ 2703(c) and 2703(d) Directing AT&T, Sprint/Nextel, T-Mobile, Metro PCS and Verizon Wireless to Disclose Cell Tower Log Information*, 42 F.Supp.3d 511, 517-518 (S.D.N.Y. 2014); *United States v. Takai*, 943 F.Supp.2d 1315, 1320-1321 (D.Utah 2013). Even if it were considered a search, the request met the exigency exception to the warrant requirement. *Takai*, 943 F.Supp.2d at 1321-1322; *United States v. Caraballo*, 963 F.Supp.2d 341, 360-362 (D.Vt. 2013). Finally, since the officers complied with federal law in obtaining the cell phone site location information, they acted in good faith and there is no suppression remedy for any violations of the statute. 943 F.Supp.2d at 1323; 963 F.Supp.2d at 365-366.

Sexton affirmatively waived a duress instruction on the murder counts and therefore is precluded from arguing on appeal that the court erred in

accommodating his request. *State v. Ford*, 2013 ME 96, ¶¶ 15-16, 82 A.3d 75. The court correctly instructed on the defense as applied to the arson count. *State v. Gagnier*, 2015 ME 115, ¶¶ 13-16, 123 A.2d 207.

There was no error, let alone clear error, in permitting a witness, Katelyn Lugdon, to testify about her observation of Sexton and Daluz with firearms on the day before the murders. *State v. Abdi*, 2015 ME 23, ¶ 16, 112 A.3d 360. Sexton's contention that Katelyn could not testify to her observations of firearms in Sexton's possession without undergoing a lineup procedure is without merit. *State v. Taylor*, 657 A.2d 659, 667 (Conn. App. Ct. 1995). Finally, there was no error in the State's redirect examination of Mark Rowe about the "occupational hazards" of the drug trade and Sexton's motive to harm murder victim Dan Borders, to rebut the misleading impressions created during Sexton's cross-examination of the witness.

PROCEDURAL HISTORY

On September 26, 2012, the Penobscot County Grand Jury returned an indictment charging Nicholas Sexton with three counts of murder (victims Daniel Borders, Nicolle Lugdon and Lucas Tuscano, respectively) and one count of arson. (Appendix "App." at 53-54.) On October 1, 2012, the State filed a Notice of Joinder for Sexton to be tried with Randall (also known as "Ricky") Daluz, who was charged with the same crimes. (*Id.* at 57.) On June 1, 2013, Sexton filed a

motion to sever joinder on *Bruton* grounds. (*Id.* at 58.) Following a hearing on August 15, 2013, the court (Anderson, J.) granted the motion on October 24, 2013, but invited the parties to submit additional memoranda on whether the court should conduct two simultaneous trials with two juries. (*Id.* at 34.)

On December 2, 2013, Sexton filed a motion for relief from prejudicial joinder. (*Id.* at 4, 59-69.) On January 28, 2014, the State filed a memorandum in opposition to the motion for relief from prejudicial joinder. (*Id.* at 4.) In a motion to reconsider dated March 5, 2014 (*id.* at 87-89), and at a hearing on March 12, 2014, the State notified the court and counsel that it would not be using several out-of-court statements by Daluz, thus eliminating any *Bruton* issues.[1] (Transcript of Motion Hearings dated March 12, 2014, at 4-5.) After the hearing on March 12, 2014, the court issued an order on April 8, 2014, denying the motion for relief from joinder. (App. at 35-39.) On April 28, 2014, Sexton filed a motion to reconsider motion for relief from prejudicial joinder, which was denied the same day. (*Id.* at 7.)

The trial commenced on May 1, 2014. (*Id.* at 8.) Testimony took place over 14 days. (*Id.* at 7-12.) Sexton took the stand and claimed that Daluz committed

[1] *Bruton v. United States*, 391 U.S. 123 (1968)(prohibiting use of non-testifying co-defendant's confession at trial.) Those statements included Daluz's claims in an interview with Detective Joel Nadeau that Sexton had dropped him off in Dedham prior to the murders, did not pick him up until Borders and Tuscano had been murdered, shot Lugdon in his presence and made the decision to burn the car. (Affidavit of Detective Joel Nadeau Submitted Pursuant to 15 M.R.S. § 1027(2) filed on August 15, 2013.)

the murders and caused Sexton to burn the car. (Transcript Excerpt Direct Examination of Nicholas Sexton on May 19, 2014.) Daluz did not testify.

Jury deliberations began on May 21, 2014. (App. at 13.) The jury returned a verdict of guilty on all counts against Daluz on May 28, 2014. (*Id.* at 14.) Although the jury found Sexton guilty of Count 2 (murder of Lugdon) and Count 4 (arson), it was deadlocked with respect to Sexton on Counts 1 and 3 (murders of Borders and Tuscano). (T.T. XIX 13-23.)

On July 31, 2015, Sexton was adjudged guilty of the murder of Nicole Lugden (Count 2) and of arson (Count 4). (App. 13, 14, 17.) He was sentenced to 70 years on Count 2 and 20 years on Count 4, to be served consecutive to Count 2. (*Id.*) He filed a notice of appeal on the same day. (*Id.* at 15.)

STATEMENT OF FACTS

On August 13, 2012, at around 3:30 a.m., a vehicle rented by Nicholas Sexton was found burning in an industrial park at Target Industrial Circle in Bangor, Maine. (T.T. II at 9-13, 24, T.T. IV 15-27, 49, T.T. XI at 71-72.) Firefighters called to the scene made a gruesome discovery: The car contained three bodies which were by then burned beyond recognition. (T.T. II at 28-29, 46-62.) The three victims were later identified as Daniel Borders, age 26, Nicolle Lugdon, age 24, and Lucas Tuscano, age 28. (*Id.* at 73, 78, 87 and 93.) The Medical Examiner concluded that Borders was killed by a gunshot that entered behind his left ear, and Lugdon was killed by a second gunshot that entered above her left ear. (*Id.* at 79-82, 86, 87-89, 93.) The fire damage to Lucas Tuscano's body was so extensive that the area where the bullets had been found in the other bodies "had been charred away." (*Id.* at 95.) The Medical Examiner concluded that Tuscano's death also resulted from "head trauma." (*Id.* at 93-96.)

The evidence at trial demonstrated beyond a reasonable doubt that Daluz and Sexton acted together to murder the three victims and burn the car to eliminate evidence of the crime.

On August 11, 2012, Nicholas Sexton of Warwick, Rhode Island renewed a rental agreement on a white 2001 Pontiac Grand Am at a rental agency located in the same town. (T.T. IV at 13, 21-25, T.T. V at 189.) The vehicle was never

returned to the agency, because it was the same vehicle found burning two days later at Target Industrial Circle. (*Id.* at 27, T.T. VI at 133-134, 137, T.T. XI at 71-72.)

On the morning of August 11, 2012, Sexton left his girlfriend Chantee Andrews in Warwick, Rhode Island driving the white Pontiac Grand Am and told her that he was picking up his friend Randall Daluz to go to Maine. (T.T. IX at 54-55.) He picked up Daluz at the home that Daluz shared with his then girlfriend, Patti Pond, in Fall River, Massachusetts. (*Id.* at 96-97, 105.) Daluz indicated to Pond that they were going "to work." (*Id.* at 106.)

In fact, Sexton and Daluz were travelling to Bangor, Maine in order to sell drugs. Witness testimony and cellular telephone records show that Sexton and Daluz were together from the time they left Massachusetts until shortly after 3:00 a.m. on August 13, 2012. (T.T. X at 200-232.)

After arriving in the Bangor area on August 11, 2012, Sexton sent a text to Katelyn Lugdon ("Katelyn") (Nicolle Lugdon's younger sister) and Dan Borders (Katelyn's boyfriend at the time). (T.T.IV at 35-38, 48.) Sexton said he was in town and needed a hotel room. (*Id.* at 48.) At the time, Katelyn and Borders were addicted to heroin and Percocet, and made their money buying drugs from Sexton and Daluz and selling the drugs to others. (*Id.* at 40-46.) Katelyn explained that she and Borders were buying fewer drugs from Sexton and Daluz by August 2012

because they were obtaining more product from another source: her sister Nicolle Lugdon. (*Id.* at 40-41, 44, 53.) Katelyn said that her sister's drugs were cheaper and of a better quality than the product sold by Sexton and Daluz. (*Id.* at 71.)

Katelyn found a room at the Village Green Motel in Brewer, Maine and used her sister's identification to rent it for Sexton and Daluz. (*Id.* at 49-50.) Once in the hotel room, Sexton and Daluz displayed a large amount of cocaine, which they were weighing and packaging for sale. (*Id.* at 51-52, 57-58.) Sexton and Daluz also had Percocet 30s (also known as "perc 30s" or "blueberries" due to the pills' blue color) and heroin for sale. (*Id.* at 70.) Borders purchased $200 of cocaine from Sexton, which was less than the quantity he had purchased from him in the past. (*Id.* at 53.) According to Katelyn, Borders purchased the cocaine from Sexton and Daluz "just to keep them happy." (*Id.*) Borders and Katelyn did not purchase any of the Percocet from Sexton and Daluz because they had already purchased some from Lugdon. (*Id.* at 71.)

During this visit, Katelyn saw two guns on the motel bed: one silver with a rounded barrel and a second one that was darker and a bit smaller. (*Id.* at 57-60.) Sexton picked up the silver gun and put it under his shirt. (*Id.* at 62.) Daluz was playing with the second gun. (*Id.*) There was also a bullet on the bed. (*Id.* at 63.)

Katelyn noted that everyone was "getting along okay at first, and towards the end it got a little hostile." (*Id.* at 52.) Sexton cornered Katelyn and demanded

to know where her "sister was getting her stuff." (*Id.* at 65.) After the confrontation, Borders grabbed Katelyn's arm and they left for their home in Glenburn. (*Id.* at 67.)

The next evening, August 12, Katelyn said that Borders went out, with plans to meet up with her later that night. (*Id.* at 90, 91.) Katelyn kept calling and texting Borders through the night and the following morning. (*Id.* at 91-92, 93-94, State's Exhibit 72 (Borders's text message record).) At 8:22 p.m. on August 12, Borders responded to Katelyn by text, "[J]ust chill. I love you so much." (T.T. IV at 92, State's Exhibit 72.) That was the last she heard from him.

Around the same time frame, Sexton, Daluz and another acquaintance, Mark Rowe, were at a bar called Carolina's in Bangor. (*Id.* at 87, T.T. VII at 81-88.) Earlier in the day, Sexton had contacted Rowe to ask him to rent Sexton and Daluz a motel room for the evening of the 12th. (*Id.* at 73.) Sexton and Daluz picked Rowe up at his home in a remote part of Dedham in the white Pontiac. (*Id.* at 74.) They drove to Bangor and reserved a room at the Ramada Inn for one night, paying cash. (*Id.* at 74-77.)

While Sexton and Daluz were at Carolina's, Dan Borders was with Nicolle Lugdon at the home of Jeramie and Beverly Schell at 15 Bolling Drive in Bangor. (T.T. V at 88, 94, 98, 179-180.) They were trying to locate Percocet 30s to supply a drug customer, Faye Harper, who had travelled to the Schells' home from her

residence in Southwest Harbor. (*Id.* at 55-56, 97-98.) Lugdon did not have a sufficient quantity of the pills for Harper, so Borders contacted Sexton by cell phone to try to obtain the drug. (*Id.* at 99-101, 179-180.) Before Sexton could deliver the pills, however, another supplier, Lucas Tuscano, arrived at the Schells' home with the product and quantity sought by Harper. (*Id.* at 56-60, 104-105, 180-181, 183.) Borders contacted Sexton to inform him that they had located a sufficient quantity of Percocet for the sale from another source. (*Id.* at 100-101.) The call apparently did not go well: When Borders got off the phone with Sexton, he appeared "aggravated and pissed." (*Id.* at 101.)

Back at Carolina's, Rowe observed Sexton making calls and texting on his cell phone. (T.T. VII at 93.) The cell phone records confirm that Borders and Sexton were calling back and forth between 8:00 p.m. and 9:48 p.m. (T.T. XII at 13-15.) At about 9:00 p.m., Borders texted Sexton, presumably in reference to the drug customer, Faye Harper: "Bro, this chick's gonna go somewhere else, in the end. It's for 40."[2] (State's Exhibit 72, T.T. XII at 14.) By 9:33 p.m., Borders texted Sexton again, "I guess, never fucking mind, man, had 90 gone but now someone else just took the play."[3] (*Id.* at 14-15.) Borders and Sexton continued to exchange calls between 9:44 and 9:48 p.m. (*Id.* at 15.) At 9:48 p.m., Borders

[2] Jeramie Schell testified that this statement meant that the customer needed "at least 40 pills and if you are not here she is going to [leave.]" (T.T. VI at 31-32.)

[3] Jeramie Schell indicated that this statement meant that he "took too long and other people came through and he didn't need what they had." (*Id.* at 32.)

responded to Sexton with the following text: "Nicky." (*Id.* at 15; State's Exhibit 72.)

Sexton told Rowe, "Dan wanted to get some 30s from him...but he wasn't going to be able to do them cheap enough for Dan." (T.T.VII at 91.) According to Rowe, "it seemed like [Sexton] was pissed" after his call with Borders: "[O]bviously you're not going to be happy about that if someone's just like, oh, never mind or whatever." (*Id.* at 92-93.) Sexton and Daluz left the bar together in the white Pontiac around 10:30 to 11:00 p.m., with Sexton driving. (*Id.* at 93-94.) Sexton assured Rowe, "Don't worry about it,...we'll be right back." (*Id.* at 94.) When they did not return, Rowe tried contacting Sexton by calling and texting, with no success, and ultimately walked to his ex-girlfriend's home to spend the night. (*Id.* at 101-103.)

Sexton appeared at the Schells' front door around 11:00 p.m. in a hooded sweatshirt and introduced himself as "Mike." (T.T. V at 117-118.) Bev Schell, who answered the door, was not acquainted with Sexton. (*Id.* at 117.) Lugdon, Borders and Jeramie Schell all recognized him, however, and Borders and Lugdon said "That's not Mike, it's Nick." (*Id.* at 118-120, 182-184.)

Sexton and Borders said they were going to leave briefly to smoke a joint. (*Id.* at 121.) "Nikki [Lugdon] wanted to go, so she invited herself to go...She asked Luke [Tuscano] if he wanted to. Luke did not want to. He wanted to sit and

just hang out. So she grabbed him by the hand and told him, come on, you're going to come with us. So he went." (*Id.*)

Borders, Lugdon and Tuscano left with Sexton in the white Pontiac shortly after 11 p.m. (*Id.* at 121, 123, 189-190.) The Schells expected that the group would be back in five minutes. (*Id.* at 122,190.) They did not return and other drug customers started to arrive. (*Id.* at 123-124,190-191.) The Schells repeatedly tried texting and calling Lugdon and Borders, but received no response. (*Id.* at 123-124, 191-194.) About 15 to 25 minutes later, their calls went straight to voicemail, and the Schells sent the drug customers home. (*Id.* at 123-124,194.)

The last text from Borders's phone was at 11:01 p.m. to Sexton: "Dude, what's going on, man, something up." (T.T. XII at 15.) The last connectivity between Borders's phone and a cell phone tower was at 11:16 p.m. in the Old Town area. (*Id.* at 33.) The last cell phone connectivity between Nicolle Lugdon's cell phone and a cell phone tower was at 11:06 p.m., still in an area that included the Schells' home at Bolling Drive. (*Id.* at 33.)

Tracking of the cell phones carried by Sexton and Daluz by the various towers showed that they were in the area that included the Schells' residence on Bolling Drive around 11:00 p.m. (T.T. X at 203, 221-222.) By 11:06 and 11:08 p.m., their phones "were moving away from the cell site servicing the Bolling Drive address." (*Id.* at 205, 221-222.) The cell phone tracking showed that Sexton

and Daluz travelled together, first to Old Town, on to Holden, and then to Dedham, where they remained from around 11:43 p.m. through 12:32 a.m. (*Id.* at 205-209, 222-224.) At the remote location where Mark Rowe lived in Dedham with his housemate Darren Bishop, a car rolled through about the time Sexton and Daluz's cell phones placed them in the same area. (T.T. VIII at 63-64.) A few days later, Bishop noticed that a blue can of diesel fuel was missing from his garage. (*Id.* at 65-66.) There were remnants of a blue container later found in the burned Pontiac (T.T. III at 32-33), and investigators with the Fire Marshal's Office determined that the fire was "a result of an intentional human element with the use of an ignitable liquid." (*Id.* at 70.) Testing revealed that liquid to be a "heavy petroleum distillate," specifically, a "diesel range product." (*Id.* at 106-115, 110-111, 114-115.)

Sexton and Daluz's cell phones left the Dedham area about 12:32 a.m., travelled towards Holden and then back to Bangor at around 1:32 a.m. (T.T. X at 226-227.) Both phones were back in the vicinity of the airport by 1:15 through 1:50 a.m. (*Id.* at 209-210, 228.) Around 2:45 a.m., Daluz finally contacted Rowe, asking for the number of the room he had reserved at the Ramada for Sexton and Daluz. (T.T. VII at 119-121.) From a few minutes after 3:00 a.m. through 3:25 a.m., Sexton and Daluz's cell phones were using cell phone towers in the area that included the Ramada Inn and the burned car. (T.T. X at 212-214, 228-232.) The

records show that Sexton and Daluz were calling or communicating with each other's phones from 3:03 a.m. through 3:32 a.m. (T.T. XII at 45-46.)

Daluz's phone moved to a different cell site that included the First Street area in Bangor between 3:32 and 3:37 a.m. (T.T. X at 231-232.) It was about that time that a taxi picked Daluz up at the Ramada and dropped him off at First Street. (T.T. IX at 12-14). Daluz arrived at the home of a friend at around 3:30 a.m. and announced his intention to do laundry. (*Id.* at 29-30.) He did not leave Bangor until a day or so later to return to Fall River. (*Id.* at 33-34, 114.)

Surveillance video from a business at Target Industrial Circle showed a man running from the burning car at about 3:13 a.m. (T.T. II at 181-182; State's Exhibit 27 (video)). It also depicted the car driving into the Target Industrial Circle area, the headlights being extinguished and flames igniting in the passenger compartment after "a very short period of time." (T.T. III at 51-52.)

Sexton returned to the same room at the Ramada Inn that Mark Rowe had rented for him and Daluz. Not surprisingly, during the period of the crimes, Sexton and Daluz did not respond to calls or texts from their respective girlfriends. (T.T. IX at 58-62.) Sexton's girlfriend, Chantee Andrews, finally made contact with him the following morning, when he called her at 9:30 a.m. on August 13. (T.T. IX at 63.) He asked her to come to Maine, saying it would be an opportunity to spend time together with their two children. (*Id.*) Andrews borrowed her

mother's car and drove to Bangor with their two children, arriving around dinner time. (*Id.* at 64-65.) When she arrived at the room at the Ramada, Sexton appeared "upset." (*Id.* at 65-67.) Instead of staying overnight as planned, they ordered dinner in the room and left Bangor together in her mother's car. (*Id.* at 66-67.) They only made it as far as Danvers, Massachusetts, where they rented a hotel room at the "CoCo Keys." (*Id.* at 67-68.) The following day, they were met by officers of the Bangor Police Department in the hotel parking lot. (*Id.* at 69-70.)

Seven months later, Glen Thibeault was engaging in his hobby of metal detecting along the Penobscot River in Bangor. (T.T. VI at 244-245.) As the tide went out, he came upon some .32 caliber rounds and two firearms: a Derringer and a Jimenez 380. (*Id.* at 244-254.) About 70 feet beyond the firearms was a cell phone. (*Id.* at 255-256.)

The firearms discovered by Thibeault were similar to the guns seen by Katelyn Lugdon in Sexton and Daluz's hotel room in Brewer on August 11, 2012. The Derringer had in fact been sold to Sexton by an Andrew Morin-Smith sometime before the murders. (*Id.* at 81-86.) A forensic specialist with the Maine State Police Crime Lab concluded that the bullet taken from Nicolle Lugdon "was fired from the bottom barrel of the Derringer." (T.T. VII at 20.) He further concluded that "the bullet taken from Dan Borders could have been fired from the Jimenez, but it was inconclusive." (*Id.* at 21.)

Sexton took the stand in an attempt to minimize his culpability. He said that he came up to Maine because "everybody wanted drugs and I was like, wow, there could be a lot of money to be made." (Transcript Excerpt of Direct Examination of Nicholas Sexton at 10.) To avoid detection, he admitted that he would use a variety of rental cars and have others reserve his hotel rooms. (*Id.* at 10-11.) Sexton admitted that he had purchased the Derringer from Andrew Morin-Smith, but contended that he had given it to Daluz because "he likes guns." (*Id.* at 13-14.) He further claimed that he recognized the Jimenez 380 as a gun that Dan Borders had sold to Daluz. (*Id.* at 14.) Sexton confirmed that he and Daluz came up to Maine together and "[hung] out all the time" to sell drugs. (*Id.* at 17-18.) He said that on the weekend of the murders he had rented the white Pontiac Grand Am and driven Daluz up to Maine. (*Id.* at 25-26.)

On the night leading to the murders, Sexton testified that he was at Carolina's bar with Daluz and then "we left the bar to go see Dan, because I told him that I'd be over when I can." (*Id.* at 49, 52-53.) Sexton said that he and Daluz arrived at the Schells' home, and that Daluz waited in the car. (*Id.* at 58-59.) Lugdon, Borders and Tuscano came out to join him for a "burn run" or to smoke some marijuana. (*Id.* at 59-60.) Sexton testified that he had Daluz move out of the front passenger seat, so that Borders could sit there, "because I was going to sell

Dan something." (*Id.* at 63.) Daluz sat in the back seat behind Borders, with Lugdon in the middle and Tuscano behind Sexton. (*Id.* at 64.)

Sexton claimed he was driving down Union Street toward the highway when "all of a sudden just commotion breaks out." (*Id.* at 66.) "Dan says something smart to Daluz." (*Id.*) "Daluz got pissed and smacked Dan in the head." (*Id.* at 69.) He testified that Daluz was hitting Borders in the head with the barrel of the Jimenez. (*Id.* at 70-71.) Sexton asserted that he told Daluz to put the gun down, and "[t]hen all of a sudden the gun goes off and everybody just starts panicking." (*Id.* at 71.) "[I]t was an accident." (*Id.*) "Daluz is like I didn't mean it, I'm sorry, it was an accident." (*Id.*)

Sexton claimed that Lugdon was "screaming and yelling to take [Borders] to the hospital." (*Id.*) When asked about Tuscano, Sexton responded: "He was the worst. He was flipping out on Daluz. He was yelling and screaming at him, and all of a sudden Daluz shoots Tuscano. The window blows out. And then [Lugdon] starts crying and screaming even worse." (*Id.* at 72.)

Sexton went on to testify that after shooting Tuscano, Daluz was "telling [Lugdon] to shut the fuck up." (*Id.* at 73.) According to Sexton, Daluz then collected "everybody's phones in the car." (*Id.* at 73.) Sexton claimed that he was afraid of Daluz, who told him to keep driving even though they were running out of gas. (*Id.* at 74-75.) Sexton continued that Daluz directed him to drive to Mark

Rowe's house in Dedham, purportedly to get fuel for the car. (*Id.* at 75-76.) Sexton said that at Daluz's direction, he grabbed a gas can, put some in the car and then saved some fuel to burn the car later. (*Id.* at 77.)

Sexton went on to say that Daluz directed him to go to a dirt road in the Hermon area. (*Id.* at 79.) Daluz, he said, forced Lugdon to ingest pills. (*Id.* at 80, 81-82.) Daluz came around the car to talk to Sexton and then "raises his other hand at the hole in the window and, boom, he shoots [Lugdon]." (*Id.* at 82.) Sexton alleged that Daluz threatened if he told anyone, he would shoot Sexton and his kids. (*Id.* at 82-83.)

"I agreed to burn the car." (*Id.* at 84.) Sexton claimed he dropped Daluz at the Ramada and drove around looking for a place to burn the car. (*Id.* at 84-85.) He returned to the Ramada, he said, because he did not have a lighter and had to retrieve one from Daluz. (*Id.* at 85.) "I just turned into the industrial park and then lit the car and came back, walked back to the hotel." (*Id.* at 86.) "I came back in the hotel and he's telling me how he called a cab, that he needs to go and wash his clothes, get the blood off them. So he took off and went to First Street." (*Id.* at 87.) Later that day, Sexton consulted with a criminal defense lawyer, David Bate. (*Id.* at 89.)

ARGUMENT

I. The trial court did not abuse its discretion by denying Sexton's motion for relief from prejudicial joinder.

This Court affords the trial court "substantial discretion" in ruling on a defendant's motion to sever and "will uphold its decision 'unless it is demonstrated that the decision is an improper exercise of its discretion and prejudice is shown.'" *State v. Williams*, 2012 ME 63, ¶ 20, 52 A.3d 911, *citing State v. Cook,* 2010 ME 81, ¶ 15, 2 A.3d 313 (*quoting State v. Parsons,* 2005 ME 69, ¶ 13, 874 A.2d 875). "An allegation that two codefendants will present antagonistic defenses and point the finger at each other is not sufficient to require severance of a joint trial." *State v. Chesnel*, 1999 ME 120, ¶ 12, 734 A.2d 1131. The court below followed this Court's precedent and, accordingly, did not abuse its discretion in denying the motion to sever, once the State indicated that it would not be using Daluz's out-of-court admissions at trial.

The United Supreme Court has long recognized that: "Joint trials 'play a vital role in the criminal justice system.'" *Zafiro v. United States*, 506 U.S. 534, 537 (1993), *citing Richardson v. Marsh*, 481 U.S. 200, 209 (1987). "Joint trials are favored to 'promote economy and efficiency and to avoid a multiplicity of trials, where these objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial.'" *Williams*, 2012 ME 62, ¶ 20, *citing State v. Lakin,*

2006 ME 64, ¶ 8, 899 A.2d 777 (*quoting Bruton v. United States,* 391 U.S. 123, 132 n. 6 (1968)).

This Court has directed the trial court to "balance the general policy in favor of joint trials against any prejudice to a defendant that may result." *Williams* at ¶ 21, *citing Parsons,* 2005 ME 69, ¶ 13, 874 A.2d 875; *State v. Boucher,* 1998 ME 209, ¶ 9, 718 A.2d 1092. "The party moving for severance has the burden to demonstrate, prior to trial, that a joint trial would result in prejudice." *Williams* at ¶ 22, *citing Lakin,* 2006 ME 64, ¶ 8, 899 A.2d 777.

In this case, the court initially granted the request for relief from prejudicial joinder, because the State had indicated its intent to offer Daluz's out-of-court admissions. Once the *Bruton* problem was eliminated, Sexton's objection to joinder was the existence of "antagonistic defenses" and the uncertainty of whether Daluz would testify and what he would say. App. 71-76; Transcript of Motion Hearings on March 12, 2014, at 14-16.

The trial court recognized the defendants' concerns in its decision issued on April 8, 2014, denying severance:

> [T]he defendants have demonstrated a fair probability that (a) each may accuse the other of killing the victims, or (b) Sexton would present evidence of an alternate suspect while Daluz, in some fashion, points to Sexton as the perpetrator. Under either scenario, one co-defendant's defenses would be so inconsistent with the other that the jury's belief in one co-defendant, or that co-defendant's case, would necessarily constitute a rejection of the testimony or case of the other.

> Additionally, one co-defendant could, to an extent, become a second prosecutor against the other.

App. at 37.

Relying on *Zafiro* and a series of cases from this Court, the trial court correctly concluded that severance was not warranted, since there was not "a serious risk that a joint trial would compromise a specific right of one of the accused, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539. "Mutually antagonistic defenses are not prejudicial *per se*." *State v. George*, 2012 ME 64, ¶ 25, 52 A.3d 903, *citing Zafiro* at 538. "[A] defendant is not entitled to severance just because a defendant is more likely to receive an acquittal through a separate trial." *State v. Chesnel*, 1999 ME 120, ¶ 12, *citing Zafiro* at 539-40.

Sexton and Daluz's defenses resemble those in other state cases in which this Court has rejected challenges to a joint trial based on "antagonistic defenses." In *State v. Williams*, this Court concluded that the trial court did not err in joining Williams' trial with his co-defendant George, even though her Grand Jury testimony was presented at trial, with all references to Williams redacted, and she elected not to take the stand. 2012 ME 63 at ¶¶ 34-40. In her prior testimony, George claimed that she was the victim of a home invasion and that unidentified perpetrators had killed her husband. *Id.*at ¶¶ 11-12. Williams, who participated in the staged home invasion and murder, testified at trial that he had traveled to

Maine from New York, but had remained in his motel room all night on the night of the crime and therefore could not have had a role in the murder. *Id.* at ¶ 18. Similarly, Sexton conceded in his trial testimony that he was present at the crime but asserted that Daluz committed the murders and forced Sexton to commit the arson. Daluz did not testify but instead argued that the State could not prove he was present at the crimes.

In *State v. Lakin*, the Court found there was no error in joining Lakin and Tuttle for trial, even though "the testimony of each of them accusing the other of killing the victim is so inconsistent that the jury's belief of one co-defendant necessarily constitutes a rejection of the other co-defendant's testimony." 2006 ME 64, ¶ 9, 899 A.2d 777. Co-defendants Chesnel and Tomah both took the stand in their joint trial and blamed the other for beating the victim to death. *State v. Tomah*, 1999 ME 109, ¶¶ 2-6, 736 A.2d 1047. The Court concluded that the "trial court did not abuse its discretion in denying Chesnel's motion to sever." *State v. Chesnel*, 1999 ME at 120, ¶ 13, 734 A.2d 1131.

Like the defendants in *Lakin*, *Chesnel*, *Tomah*, *Williams* and *George*, Sexton was not unfairly prejudiced by the existence of antagonistic defenses. This Court has held that the risk of prejudice raised by such defenses may "be cured by instructions to the jury that they must separately determine each defendant's guilt beyond a reasonable doubt." *Id.* at ¶ 12. In this case, the trial court gave just such

an instruction to the jury, at the very beginning of the trial and again before they began their deliberations. (T.T. I 17-18; XIV at 153-154). Any risk of prejudice as a result of so-called antagonistic defenses was cured by the court's instructions, as well as its general vigilance at the trial.

Sexton further argues that he was prejudiced by a joint trial because he was not permitted to use certain out-of-court statements by Daluz that inculpated Daluz. Given his offer of proof, however, Sexton would not have been able to use the statements even if his trial had been severed. During his cross-examination of Katelyn, he sought to question her about statements that Daluz had allegedly made to another witness, John Harmon, while both Harmon and Daluz were housed at the Penobscot County Jail. (T.T.IV at 80-87.)[4] The court correctly indicated that "the issue is going to come if anyone tries to call Harmon." (*Id.* at 85.) Sexton presented no foundation that Katelyn had heard the out-of-court admission, so the court never reached the issue of whether the statements would be admissible if proffered by Sexton under Rule 804 of the Maine Rules of Evidence or, if admissible through Harmon, whether the statements that implicated Sexton would also have to be included under Rule 106. No one ever called Harmon as a witness.

[4] *See* Affidavit of Detective Joel Nadeau Submitted Pursuant to 15 M.R.S. § 1027(2) filed on August 15, 2013 at ¶ 94 ("Daluz told Harmon...that Sexton had come to pick him (Daluz) up and two were already dead. According to Daluz, the two biggest threats had to be taken out first. The person who was alive was crying and hysterical saying 'please don't kill me' and begging for their life...Harmon said that Daluz told him that he shot the third person to solidify Sexton's trust...")

Sexton again attempted to expose the jury to the inculpatory statement made by Daluz in response to the following cross-examination of Sexton by Daluz:

> Q: Now, you have been present throughout this trial to listen to the testimony and heard the rental car agent come in and talk about how you rented the car, right?
> A: Yeah.
> Q: And how you didn't return it, right?
> A: Yeah.
> Q: And you heard the Schells talk about the fact that you were the last one that they saw with Lugdon, Borders, and Tuscano, right?
> A: Yeah.
> Q: And we heard a lot about you relative to those individuals, correct?
> A: What do you mean about?
> Q:...In any event, isn't it true that you decided that since the evidence was looking real bad for you, that you were going to testify and bring Mr. Daluz down with you?
> A: That wasn't my decision.

(T.T. XIII at 115-116.)

Sexton's counsel requested the court at sidebar to permit him to confront Sexton with Daluz's alleged out-of-court statement to John Harmon:

> Does not that allow him [Sexton] to comment on some of the evidence that his codefendant may have provided that led to that decision? I mean, I didn't ask that question and he wants to leave the impression that there's a few other considerations that went into his decision to testify, including the one where he's accused...of showing up in Dedham with two dead bodies and he [Daluz] just happened to get in the car...And the statement from the cellmate where Mr. Daluz acknowledges that he shot and killed Ms. Lugdon with the derringer to gain Mr. Sexton's trust. I mean, it seems to me that if you're going to leave the jury with an impression that his decision to testify was based upon the status of the evidence in this case, there's other considerations I should be able to ask for.

(*Id.* at 117.) Daluz's counsel pointed out: "I didn't ask him have you reviewed the discovery, as a result of your review of the discovery did you believe that you were painted into a corner. I asked him about the evidence admitted in the trial and whether that affected his decision about his testimony." (*Id.* at 119.) The court concluded that "it has not been generated to permit Mr. Toothaker to ask that question." (*Id.*) The court's ruling was not clearly erroneous or an abuse of discretion and would not have been different had Sexton had a separate trial or a separate jury evaluating his testimony.

II. Sexton cannot appeal the lack of a jury instruction on the defense of duress with respect to the murder counts, when Sexton affirmatively waived the instruction.

A. Procedural History

Sexton requested that the trial court provide an instruction as to the defense of duress on the arson charge. Accordingly, the court initially instructed the jury on May 20, 2014, as follows:

> ...Mr. Sexton's defense counsel has asked you to consider the defense of duress with regard to the offense of arson. Under certain circumstances, a person may be excused from criminal responsibility for acts committed under duress. A person is not criminally responsible if he is compelled to do an act by threat of imminent death or serious bodily injury to himself or another person or by direct physical force.
>
> However, duress exists only if the force or threat or circumstances are such as would have prevented a reasonable person in the defendant's situation from resisting or escaping from the force or threats.

> Because the evidence generates an issue of whether the defendant was acting under duress, the State must prove beyond a reasonable doubt either that the defendant was not acting under duress, or that the force or threat or circumstances claimed to have created the duress were not such as would have prevented a reasonable person in the defendant's situation from resisting or escaping from such force or threats or overcoming the circumstances.

(T.T. XIV at 165.)

The jury began deliberations the following morning at 8:30 am. (*Id.* at 189.) At 1:20 P.M., the jury asked "what imminent means." (T.T. XV at 9.) The court invited counsel's positions on whether it should (1) decline to define the term "imminent," (2) instruct that "imminent" means what "the jurors think it is in common usage," or (2) use the definitions found in the case law. *Id.* Specifically, the court proposed following the guidance from Alexander, *Maine Jury Instruction Manual*, §6-57 (2014 ed. Lexis Nexis Matthew Bender):

> In Alexander's jury instructions he talks about *State vs. Tomah* indicates that a threat sufficient to establish the defense must be real and specific and the specific harm that is feared must be imminent. A veiled threat of future unspecified harm is not sufficient to raise the defense of duress. He mentions that in *State v. Larrivee* addresses the term imminent as applied to the law of duress...And I will read for the record what *Larrivee* says. The determination of what constitutes a threat of imminent death or serious bodily injury should be predicated upon the reasonable opportunity for escape or surrender. Imminent means ready to take place, near at hand, impending, hanging....threateningly over one's head, menacingly near. Implicit in this concept of imminent, therefore, is the opportunity to escape the harm.

(*Id.* at 9-10.) Sexton objected to any further clarification, requesting that the court "not give them anything more. They have to figure out based on what they've got." (*Id.* at 10.)

At 2:25 P.M., the jury returned with three more questions, with the third question being, "Are we being asked to consider that Nick Sexton was under duress during the murders?" (T.T. XV at 17-18.) Sexton's trial counsel made clear that his request for the duress instruction applied only to the arson charge, although there was some debate between Sexton's co-counsel whether the jury should now be instructed to apply duress to the murders. (*Id.* at 19-20.) As Sexton's counsel stated, "We argued duress only for the arson charge. We made it very clear that our position was that [Sexton] didn't have anything to do with kaboom one, kaboom two, and...obviously didn't want kaboom three." (*Id.* at 20.) After discussion, Sexton's counsel asked that the court respond "no" to the third question: "That's not how we argued it at all. And I don't want to confuse them by now interjecting duress into murder, murder, murder and then not arson...[Y]ou know what I'm saying, I think. No duress..." (*Id.* at 25-26.)

The court agreed with Sexton's counsel that it would not instruct the jury to consider the defense of duress in deliberating the murder counts:

> Even if you wanted it, I would not be giving it for a couple of reasons. One reason is it was not requested in the first place. Another reason is it was not argued in the first place. I think it's too late to inject this into the deliberation of the jury. And the third issue is that there's a

> significant issue as to whether it's appropriate anyway. I believe we discussed in chambers that it seemingly does not apply to at least being a principal to a homicide. There is maybe some question as to whether...duress applies to being an accomplice to a homicide.

(*Id.* at 28.)

The court instructed the jury with respect to their questions:

> Are we being asked to consider that Nick Sexton was under duress during the murders. We have been asked to consider duress for arson. The answer to that question is no. So are we being asked to consider that Nick Sexton was under duress during the murders? No, it does not play a part in—it is not being posed as a defense in that situation.

(*Id.* at 32.)

On May 23, 2014, at 7:05 P.M., the jury sent another note asking: "[O]ne of the jurors has the following questions. Did you say we cannot use...duress as a defense for murder. Question two, if yes, why is this missing in the instructions. And three, can duress be used to find a defendant not guilty of murder if the defense has not requested it." (T.T. XVII at 12, 13.) Sexton's counsel agreed with the State that the jury had to be instructed that duress only applied to the arson count: "I didn't argue duress...[A] consistent position of Mr. Sexton has been these things happened, I wasn't an accomplice, I didn't do it, I wasn't participating, I didn't know the gun was loaded, I didn't know there was a gun, I didn't know. So I'm saying I have to agree with the State because they are occasionally correct." (*Id.* at 15-16.)

Based on the chambers discussion, the court instructed the jury as follows:

> Question one: Did you say we cannot use duress as a defense for murder? You cannot consider duress as a defense for murder.
>
> Question two: If yes,...why is this missing from the instructions. I didn't actually think it was missing from the instructions. I didn't indicate that you could, but I just want to clarify that now. I realize that I didn't put those words in there, you cannot consider murder, but I didn't include it as something you could consider so—but in any event, you can't consider duress as a defense for murder.
>
> And then the third question I think I've answered as well. Can duress be used to find a defendant not guilty of murder if the defense has not requested it. And the answer is you cannot use duress as a defense for murder. That's it.

(*Id.* at 18-19.)

B. Legal Argument.

By expressly declining that the trial court provide an instruction on duress as applied to the murder counts, Sexton "affirmatively waived" the instruction and cannot assert on appeal that the court's accommodation of his request at trial is reversible error. *State v. Ford*, 2013 ME 96, ¶¶ 16-17, 82 A.3d 75. Under 17-A M.R.S. § 101 (1), the trial justice is not required "to instruct on an issue that has been waived by the defendant." "[O]bvious error review is precluded when a defendant 'expressly waives' a jury instruction." *Ford*, 2013 ME at ¶ 15. This Court has "rejected the argument that obvious error review provides an 'invitation to change the trial and instruction request strategy when the results of the original strategy turn out less favorably than hoped for." *Id.* at ¶ 15.

Even if Sexton had requested the instruction, the evidence did not generate it:

> A defendant is entitled to an instruction [on a defense] when the evidence is sufficient to make the existence of all the facts constituting the defense a reasonable hypothesis for the factfinder to entertain....Because [the issue] on appeal is whether the trial court erred in determining that the evidence did not generate the defense of duress, we consider the evidence in the light most favorable to [the defendant.]

State v. Gagnier, 2015 ME 115, ¶ 2, 123 A.3d 207 (citations and quotations omitted).

As this Court stated in another joint murder trial:

> Duress exists only if, viewed objectively, "the force, threat or circumstances are such as would have prevented a reasonable person in the defendant's situation from resisting the pressure."
>
> A threat that serves the basis of a duress defense must be real and specific, and the specific harm that is feared must be imminent. A "veiled threat of future unspecified harm" is not sufficient to raise the defense of duress.

State v. Tomah, 1999 ME 109, ¶¶ 18-19, 736 A.2d 1047 (citations omitted).

This Court concluded that Tomah failed to generate the defense of duress, when there was insufficient evidence "to support a finding that Tomah, if he played a role in the beating, was compelled to beat and kill [the victim] out of fear of [co-defendant] Chesnel." (*Id.* at ¶ 20.) Tomah testified that Chesnel was preparing to have sex with the victim, when Chesnel "*suddenly attacked* [the victim] with a sledgehammer, and continued to beat him. Tomah said that he was

present in the motel room, but was not involved in the beating." (*Id.* at ¶ 2.) (emphasis added.)

Sexton's story strongly resembled Tomah's: He was present but had no role in the murders. Sexton claimed that he was just going for a drive to smoke marijuana with friends, when "*all of a sudden* the gun [held by Daluz] goes off" and kills Borders, and then "*all of a sudden* Daluz shoots Tuscano." (Transcript Excerpt of Direct Examination of Nicholas Sexton at at 71-72 (emphasis added).) According to Sexton, it was also Daluz who took it upon himself to shoot Lugdon, without any warning to or consultation with Sexton: "Then [Daluz] raises his other hand at the hole in the window and, boom, he shoots [Lugdon]." (*Id.* at 82.) Under Sexton's version, he took no part in the murders—accomplice or otherwise.

Moreover, even under Sexton's self-serving testimony, the only alleged threat made by Daluz to Sexton was *after* the murders: "After he shot Nicky he was like, telling me not to say nothing to anyone. He was like, if you say anything to anyone, mention my name, this or that, he's going to shoot me and kill my kids. I'll come down and find you and your kids and kill your family." (*Id.* at 82-83.) Like the Tomah case, "[t]here was no evidence that [Daluz] specifically threatened to harm" Sexton if he did not participate in the murders or that he made any threat whatsoever prior to the murders. 1999 ME 109 at ¶ 20. Even if the defense of

duress is available to defendants charged with murder on an alternative theory of accomplice liability, the record was barren of any evidence to support it.

Moreover, duress is a statutory defense and the statute specifically provides that it is "not available" for "a person who intentionally or knowingly committed the homicide for which the person is being tried." 17-A M.R.S. § 103-A(3)(A). Sexton contends that exclusion does not apply to him, because the jury was charged to also consider his liability for murder as an accomplice. Sexton's Brief at 23. The jury was instructed, however, that to find Sexton or Daluz guilty of murder as an accomplice, they would have to find that it was their "intent, that is, their conscious object to promote or facilitate the commission of the murder." (T.T. XIV at 162.) Given the intent and conduct necessary to convict a defendant of murder as an accomplice, the distinction of being an accomplice should not make any difference in the application of the defense of duress.

Finally, Sexton claims that the court committed error in its response to the jury's request for a definition of "imminent." Sexton's brief at 25-26. It is unclear from the transcript how the court ultimately instructed the jury in response to this request, but all of its proposals were derived from this Court's precedent in *State v. Tomah* and *State v. Larivee*, 479 A.2d 347, 349, 351 (Me. 1984); *see also State v. Gagnier*, 2015 ME 115, ¶ 16, 123 A.3d 207. This Court reviews "jury instructions in their entirety to ensure that they informed the jury correctly and fairly in all

necessary respects of the governing law." *State v. Nelson,* 2010 ME 40, ¶ 13, 994 A.2d 808. Even if the court's response to the jury's question was the excerpt selected by Sexton at footnote 29 at page 25 of his brief ("duress exists only if the force or threat of force or circumstances are such as would have prevented a reasonable person in the defendant's situation from resisting or escaping from the force or threat"), the court correctly stated the statutory language from 17-A M.R.S. § 103-A(2)(" compulsion exists only if the force, threat or circumstances are such as would have prevented a reasonable person in the defendant's situation from resisting the pressure"), along with this Court's clarification of "imminent" in *Larivee* at 351 ("Implicit in this concept of 'imminent,' therefore, is the opportunity to escape that harm. *See* W. LaFave & A. Scott, *Handbook on Criminal Law* § 49 at 378–79 (1972).") There was no error in the court's subsequent instruction—if there was a subsequent instruction—on the term "imminent."

III. The trial court did not abuse its discretion in permitting Katelyn Lugdon to testify about the guns that she observed in Sexton's hotel room.

A. Procedural background.

The parties conducted a voir dire examination of witness Katelyn Lugdon ("Katelyn") on May 5, 2014. (T.T. III at 139-175.) At the time of the voir dire, Sexton's counsel objected to Katelyn being shown photographs of the two firearms

that were believed to have been used in the murders. (*Id.* at 170.) The court deferred a ruling on the objection. (*Id.* at 171.)

Prior to Katelyn's testimony on the following day, the court announced that "some form of identification of the firearms is admissible. I think the case law is quite clear that the principles that apply to out of court identification of defendants does not apply to out of court identification of inanimate objects." (T.T. IV at 4.) Sexton's counsel conceded that they could not offer "any case law any different, but we want our position known and preserved pursuant to 401, without further ado, that we oppose this...[W]e object." (*Id.* at 6.) Daluz's counsel also objected under Rule 403 "because the extent to which the witness may be influenced by any suggestibility of the officer impacts on the extent to which her testimony may be misleading or confusing to the jury or otherwise unduly prejudicial to the defense." (*Id.* at 7-8.) The court indicated that it would not prohibit Katelyn from testifying about the guns or the State showing her the guns. (*Id.* at 8-9.)

Katelyn testified before the jury that on August 11, 2012 (*id.* at 48), she observed two guns in Sexton and Daluz's hotel room: "The first one was I believe silver and it was a more rounded barrel. And the second one was a bit darker and it was a bit smaller and it had more, like, two holes to it." (*Id.* at 59-60.) Sexton objected "to any mention of [Katelyn] seeing guns." (*Id.* at 60.) The objection was overruled. (*Id.* at 60-61.)

There was no testimony on direct examination referencing any out-of-court identification of the firearms, nor were the firearms or photographs of the firearms displayed to her. Rather, it was Daluz's counsel on cross who elicited her testimony that the investigating officers had shown Katelyn photographs of the firearms, although the questioning suggested that there were differences between the firearms depicted in the photographs and Katelyn's description. (*Id.* at 120-122, 182-183.) Sexton did not object.

B. Legal Argument.

"When admission of evidence is challenged, [this Court reviews] a trial court's foundational findings to support admissibility for clear error and its ultimate determination of admissibility for an abuse of discretion." *State v. Abdi*, 2015 ME 23, ¶ 16, 112 A.3d 360, *citing State v. Gurney,* 2012 ME 14, ¶ 36, 36 A.3d 893. The court committed no error or abuse of discretion below in permitting Katelyn to describe the firearms she observed in Sexton's hotel room the day before the murders.

Sexton argues on appeal that Katelyn's testimony was somehow "tainted" because investigators displayed to her photographs of the firearms connected to the murders after she had provided a description of the firearms that she saw in the hotel room. In making the argument, Sexton applies the wrong standard: the standard for identifying live suspects in a photo array. He has cited no case that

supports using the lineup procedure for the out-of-court identification of inanimate objects, including firearms, and the State has found no authority for his argument.

Other courts that have addressed this issue have concluded that "[t]he risks inherent in a misidentification of inanimate objects produced in the thousands are not the same as the risks of misidentification of unique human beings." *People v. Miller*, 535 N.W.2d 518, 523 (Mich. Ct. App. 1995) (identification of a car; citing cases). "[A]ny suggestiveness in the identification of inanimate objects is relevant to the weight, not the admissibility, of the evidence." *Id.*; *see also People v. Hogan*, 114 P.3d 42, 51 (Colo. App. 2004) (identification of gun); *Commonwealth v. Simmons*, 417 N.E.2d 1193, 1195-1196 (Mass. 1981) (identification of car). "There is no authority holding that a defendant's due process right to reliable identification procedures extends beyond normal authenticity and identification procedures for physical evidence offered by the prosecution." *Dee v. State*, 545 S.E.2d 902, 904 (Ga. 2001) (identification of gun); *see also State v. Taylor*, 657 A.2d 659, 667 (Conn. App. Ct. 1995) (identification of gun) ("the ordinary rules governing the admissibility of objects afford the defendant adequate protection."). The court committed no error, let alone clear error, in admitting Katelyn's testimony describing the guns over Sexton's objection.

IV. The trial court did not commit clear error or an abuse of discretion in denying Sexton's Motion to Suppress his cell phone site location information.

A. Procedural background.

On January 31, 2014, the court held a hearing on Sexton's motion to suppress cell phone site location information ("cell site information") to locate Sexton in Danvers, Massachusetts. (App. at 83; Motion Hearing transcript dated January 31, 2014 ("Tr. 01/31/14").) The suppression court heard evidence that the investigating officers requested the cell site information from Sexton's carrier MetroPCS on the morning of August 14, 2012, under the exigent circumstances provision of the federal Stored Communications Act, 18 U.S.C. § 2702(c)(4). [5] *See* State's Exhibit No. 2 for hearing on January 31, 2014. The fax "Exigent Circumstances Request" described the "Nature of the Emergency" as "Triple Homicide Investigation. Suspect at Large. Suspected Target number of suspect is MetroPCS." *Id.*

At the time that they made their request, the officers were aware of the triple homicide committed in Bangor within the prior 24 hours (*id.* at 46-48, 171), that the victims had been found in a burned vehicle that had been rented by Nicholas Sexton of Warwick, Rhode Island (*id.* at 48-49), that three individuals were

[5] The relevant statute provides that "A provider,...may divulge a record or other information pertaining to a subscriber to or customer of such service...(4) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to emergency."

missing and that Sexton had been the last person seen with them (*id.* at 53-54), that Sexton was likely armed and dangerous (*id.* at 81-82, 83-83, 181), that Sexton may have a "hit list" that included individuals who had not yet been killed (id. at 84, 104, 129-139), that Sexton was likely travelling south in the company of his girlfriend Chantee Andrews who could not tell officers where she was and claimed Sexton was not with her (*id.* at 60-64), that Chantee Andrews might be at risk (*id.*), that Sexton might be fleeing the State of Maine to avoid arrest (*id.* at 156-157), and that Sexton's companion Daluz might be at risk or pose a risk to others (*id.* at 84-85).

By the time of the request to MetroPCS, the officers had already been able to independently determine by using Chantee Andrews' cell site information that Andrews was at a location in Danvers, Massachusetts, which turned out to be the Doubletree Hotel. (*Id.* at 117-118, 120-121, 179.) When they located Andrews in the hotel parking lot, Sexton was with her. (*Id.* at 68-69.)

The court denied the motion to suppress:

> The Court finds that in making the emergency request for these cell phone records, the police were not engaged in a Fourth Amendment "search."...Furthermore there is strong probable cause existing on August 14, 2013 (sic) that Sexton had killed three people, was fleeing, and posed a significant threat to others. Even if obtaining the records constituted a search, the records and their fruits are admissible because of the existence of probable cause and exigent circumstances. See State v. Moulton, 481 A.2d 155 (Me. 1984). Finally, the officers exercised good faith based on what was authorized by statute, in obtaining the records.

> Additionally, the police found Mr. Sexton and Ms. Andrews by using her phone records. Because Mr. Sexton has no reasonable expectation of privacy in her phone records, those records and their fruits are also admissible.

App. at 41. The Order incorporated the more detailed analysis found in its Order denying co-defendant Daluz's motion to suppress. *Id.*

B. Legal Argument

This Court does not have to reach the issue of whether the investigating officers were authorized under the exigent circumstances provision of the Stored Communications Act, 18 U.S.C. § 2702(c)(4),[6] to obtain cell site information from Sexton's carrier to locate him in Danvers, Massachusetts, because the suppression court found that the officers used Chantee Andrews' records, not Sexton's, to find him. In reviewing the trial court's decision on a motion to suppress, this Court will review the court's "findings of fact for clear error and its legal conclusions de novo." *State v. Babb*, 2014 ME 129, ¶ 9, 104 A.3d 878. This Court will further "uphold the court's denial of a motion to suppress if any reasonable view of the evidence supports the trial court's decision." *Id.* There was competent evidence on the record supporting the court's conclusion that the officers did not use Sexton's cell site information to locate him. Since Sexton had no reasonable

[6] The Maine legislature later enacted provisions entitled Electronic Device Location Information, 16 M.R.S. §§ 647-650-B (eff. Oct. 9, 2013). The state statute contains a similar exigency exception to the warrant requirement. 16 M.R.S. § 650(4).

expectation of privacy in Chantee Andrews' cell site information, he had no standing to challenge the officers' use of such information to locate him. *State v. Filion*, 2009 ME 23, ¶ 11, 966 A.2d 405.

The court's finding of exigent circumstances is also supported by the record. This Court has observed that "determining exigent circumstances is inherently fact-specific." *State v. Bylinsky*, 2007 ME 107, ¶ 30, 932 A.2d 1169. "[A] warrantless search is not unreasonable, and thus not unconstitutional, if 'it is supported by probable cause and exigent circumstances exist requiring a prompt search without the delay occasioned by the need for a warrant.'" *State v. Martin*, 2015 ME 91, ¶ 8,120 A.3d 113. It is difficult to imagine circumstances more exigent than an armed triple murder suspect fleeing across State lines. *United States v. Caraballo*, 963 F.Supp.3d 341, 362 (D.Vt. 2013) ("there can be no reasonable dispute" that obtaining cell site information was occasioned by an exigent situation when officers had reason to believe that armed suspect of an execution style homicide was at large.)

The court was further correct in its legal conclusion that obtaining a suspect's cell site information does not constitute a search within the meaning of the Fourth Amendment. App. at 45-49. Cell phone carriers maintain in the regular course of business information regarding the cell phone towers near (or receiving signals from) a specific cell phone. *See e.g.* Hearing on Motions dated April 17,

2014 at 27-33 (Tr. 4/17/14); *United States v. Giddins*, 57 F.Supp.3d 481, 491-495 (D.Md. 2014); *In re Application of the U.S.A. for an Order Pursuant to 18 USC §§ 2703(c) and 2703(d) Directing at AT&T, Sprint/Nextel, T-Mobile, Metro PCS and Verizon Wireless to Disclose Cell Tower Log Information*, 42 F.Supp.3d 511, 517 (S.D.N.Y. 2014). Since the subscriber voluntarily provides this information to commercial carriers, he has no reasonable expectation of privacy of cell site information under the "third-party disclosure doctrine." *Id.*; *see also United States v. Caraballo*, 963 F.Supp.2d 341, 357-360 (D.Vt. 2013); *United States v. Takai*, 943 F.Supp.2d 1315, 1321 (D.Utah 2013). Indeed, if a subscriber would like to avoid detection, he need only to power off his phone. (Tr. 4/17/14 at 33.)

Moreover, the court further correctly concluded that suppression was not warranted because the officers acted in good faith in making their "exigent circumstances" request to MetroPCS. App. at 49. The officers were objectively reasonable in relying upon a federal statute that authorized their obtaining cell site information on an emergency basis without a warrant or court order. *Illinois v. Krull*, 480 U.S. 340, 349-350 (1987). The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect..." *Id.* at 346. The Supreme Court has held that the rule has no deterrent value when an officer reasonably relies on statutory authority that is later determined to be unconstitutional. "[E]xcluding evidence obtained pursuant to it

prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." *Id.* at 350. Neither the United States Supreme Court nor the First Circuit has made a determination that the provision relied on by the officers in Sexton's case was unconstitutional or otherwise invalid. *In the Matter of the Application of the United States of America for an Order Pursuant to Title 18, United States Code, Section 2703(d) to Disclose Subscriber Information and Cell Site Information*, 849 F.Supp.2d 177, 178 (D.Mass. 2012); *United States v. Letellier*, 2015 WL 6157899 (Slip Op. D.Mass. Oct. 20, 2015).

Finally, the court would have been correct in denying the motion to suppress on the theory of inevitable discovery. "The inevitable discovery exception to the exclusionary rule permits the use of evidence that has been obtained in violation of the Fourth Amendment to the United States Constitution and article I, section 5 of the Maine Constitution when that evidence 'inevitably would have been discovered by lawful means.'" *State v. Rabon*, 2007 ME 113, ¶ 19, 930 A.2d 268, *citing State v. Storer,* 583 A.2d, 1016, 1020 (Me. 1990)(*quoting Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984)); *State v. Nadeau*, 2010 ME 71, ¶¶ 41-42, 1 A.3d 445. The State ultimately obtained a warrant covering the same information as the exigent circumstances request, without relying on any information derived from that request. (Tr. 1/31/14 at 86-88.) For these reasons,

the warrant would have produced the same information that was provided in response to the exigent circumstances request.

V. There was no misconduct in the State's questioning of witness Mark Rowe on redirect examination.

A. Procedural background.

The State attempted to elicit from witness Mark Rowe on direct his observations of Sexton at Carolina's Bar in the hours before the murders, in part to support a motive to kill one of the three victims, Dan Borders, who was a competing drug dealer. Specifically, Rowe was asked about the relationship between Sexton and Borders and about the fact that the individuals in their circle or group called Borders a "dickbag." (T.T. VII at 67-68.) Rowe testified that on the evening leading up to the murders, Sexton was communicating with Borders about a drug transaction and appeared angry when Borders told him that he was going to obtain drugs from another source. While Rowe conceded that he had described Sexton to investigating officers as "pissed," he minimized Sexton's reaction during his testimony, qualifying his description with the phrase "but it didn't seem like he was supermad about it..." (*Id.* at 91-93.)

In his cross, Sexton's counsel attempted to further minimize the tensions between Sexton and Borders by asking Sexton a number of leading questions about the "occupational hazards" of the drug trade. (*Id.* at 139.) Rowe testified that the

primary hazard was "getting arrested," "getting caught." (*Id.*) He went on to say that the group believed that Borders "wasn't smart" in that he put them at risk by his practice of sending "a mass text message" when drugs were available for sale. (*Id.* at 140.) Rowe purported to agree with Sexton's counsel that the group called Borders a "dickbag" because of his "marketing technique of mass texting," but that they were just "teasing" him. (*Id.*) Asked whether Borders "like[d] his nickname," Rowe responded, "[I]t was almost like he thought it was—it just made him closer with us. It was kind of like brothers, I don't know. It wasn't like we were trying to hurt his feelings..." (*Id.* at 147.)

On redirect, the State followed up by asking about the darker side of the so-called "occupational hazards":

> Q: What are some of the other occupational hazards that you have observed with some of the people you know to sell drugs?
> A: I mean, some people if you don't pay them or whatever, they'll get rough with you, but didn't really—that never was the case really.
> Q: Well, you have had friends that that's happened to, haven't you?
> A: Yeah.
> Q: And you are aware that some of those people are connected to Mr. Sexton?
> A: Yeah, I was told about the events, yeah.
> Q: Are they connected to Mr. Daluz as well?
> A: I have no idea.
> Q: Now you were asked about whether it was smart to send out mass texts and you talked about how that had come up; is that right?
> A: Yeah...
> Q: Was Mr. Sexton unhappy with that tactic?
> A: I mean, he just thought it was stupid because it's stupid.
> Q: Was Mr. Daluz unhappy with that tactic?
> A: Probably thought the same.

Q: Did you hear the two of them talking about that in your presence?
A: I may have, but it's briefly.
Q:...Was that directly related to Dan Borders?
A: The mass text sending.
Q: He's the one who did that, right?
A: Yeah.

Id. at 177-179.

Neither counsel for Sexton or Daluz objected to these questions. After the State completed its redirect and prior to Sexton's recross, the court called counsel to sidebar and expressed these concerns:

> I thought I would do this while you're still able to ask questions of the witness. Concerning the liabilities of dealing in drugs question that was just asked and I overruled an objection[7] to and I let him indicate that, you know people can get mad at you, then there was a question about Mr. Sexton. I'm not sure I understood everything, but it almost appeared that there was a comment that Mr. Sexton had harmed somebody in the past...I was left with the perception that there had been testimony that Mr. Sexton had harmed people in the drug trade previous to this...I wanted to indicate that had there been an objection to the second question that in my belief elicited that response, I would have sustained the objection. If that did come out, I would give some sort of instruction to the jury about it, because some prior act in that regard I'm not going to let in.

(*Id.* at 185-186.) Both defense counsel indicated that they did not interpret the questioning in the same manner that the court had. (*Id.* at 186-187.) The State pointed out that it did not ask about Sexton's prior bad acts. (*Id.*) Neither defense

[7] In fact, the court sustained, rather than overruled, the sole objection made during the State's redirect examination: "You were asked about occupational hazards. Is one of an (sic) occupational hazard of selling drugs potentially people getting angry and lessons being taught?" (T.T. VII at 177.) The basis for sustaining the objection was because the court deemed the question "leading." (*Id.*)

counsel requested a corrective instruction or other measure to address the court's concerns.

B. Legal Argument.

Since neither counsel objected below, the standard for review is obvious error. *State v. Dolloff*, 2012 ME 130, ¶ 35, 58 A.3d 1032. Contrary to Sexton's assertion at page 49 of his brief, Rowe's testimony in no way deprived Sexton of a fair trial. First, it did not establish that Sexton had engaged in any prior violent acts to settle unpaid drug transactions. For this reason, there was no "actual misconduct" on the part of the prosecutor in following up on the questions by Sexton's counsel about the "occupational hazards" of the drug trade. *State v. Clark*, 2008 ME 136, ¶ 32, 954 A.2d 1066 (first, "determine whether there was actual misconduct"); *State v. Dolloff*, 2012 ME at ¶ 64. Second, even if this Court were to conclude that the questions were in error, the questions must be analyzed "in the overall context of the trial." Dolloff, 2012 ME at ¶ 44.

> To assess harmfulness we "must not only weight the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo." A key consideration is whether the "prosecutor's remarks were 'invited,' and did no more than respond substantially in order to 'right the scale.'"

Id. at 64 (citations omitted.)

Sexton's cross-examination led Rowe down a line of questioning that distanced him from statements that he had previously made to investigators about

Sexton's anger at Borders and purported to create the impression that calling Borders a "dickbag" was almost a sign of affection towards a person they treated like a brother. (T.T. VII at 146-150.) Carolina's Bar was portrayed as a Cheers for the drug trade, where everybody knows your name: "People coming in, hi, how are you, walking into the corners with smiles, see you later next time, right?" (*Id.* at 147-148.) The State merely refocused the defense line of questions about the "occupational hazards" of the drug trade to establish that Sexton had a conflict with Borders and a motive to harm him.

Sexton further contends that the testimony on redirect was inadmissible because it was hearsay, unfairly prejudicial, confusing and misleading. In fact, Sexton's statements—overheard by Rowe—constituted admissions about his sentiments towards Borders and were probative of motive. Even if this line of questioning--that neither counsel objected to--could be construed as misconduct, it does not amount to obvious error. *State v. Dolloff*, 2012 ME at ¶ 35.

CONCLUSION

For all the foregoing reasons, the judgments of conviction should be affirmed.

Respectfully submitted,

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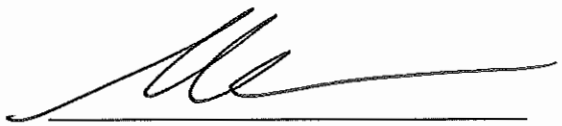

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CERTIFICATE OF SERVICE

I, Leanne Robbin, Assistant Attorney General, certify that on the date indicated below, I have sent two copies of the "Brief of Appellee State of Maine" to the counsel of record for Appellant Nicholas Sexton by United States mail, first-class, postage prepaid, addressed as listed below:

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